IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 1032 94

ELMER W. KELLEY AND THE GENERAL STREET SIGNAL CORPORATION,
Petitioners,

against

THE CITY OF SYRACUSE, CROUSE-HINDS COMPANY, AND SYRACUSE LIGHTING COMPANY,
Respondents.

ELMER W. KELLEY AND THE GENERAL STREET SIGNAL CORPORATION,
Petitioners,

against

THE CITY OF NEW YORK AND JOHN A. HARRISS,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

HAROLD E. STONEBRAKER,
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Counsel for Petitioners.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your Petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals en-

tered on March 13, 1940, denying Petitioners' motion to recall the mandates and restore the cases to the calendar for reargument before the Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the District Court in *Elmer W. Kelley et al.* v. *The City of Syracuse et al.* is reported in 47 F. (2d) 347, and the decision of the Circuit Court of Appeals in the same case is reported in 47 F. (2d) 349.

The opinion of the District Court in *Elmer W. Kelley et al.* v. *The City of New York et al.* is reported in 58 F. (2d) 831, and the decision of the Circuit Court of Appeals in the same case is reported in 63 F. (2d) 1007.

JURISDICTION

The decision of the Circuit Court of Appeals was entered March 13, 1940.

The jurisdiction of this Court is invoked under the provisions of Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

SUMMARY STATEMENT OF MATTER INVOLVED

This is a suit for patent infringement, and involves a Traffic Signaling System, invented by Elmer W. Kelley, Patent No. 1,132,186, dated March 16, 1915, for controlling traffic in the streets of cities. This same patent was involved in suits against the cities of Syracuse and New York, and the issue of infringement was decisive of both cases.

The Court which heard the appeal in the case against the City of Syracuse et al. and decided said appeal on January 19, 1931, reported in 47 F. (2d) 349, consisted of Martin T. Manton as presiding Judge, and the Honorable Augustus N. Hand and Harrie B. Chase.

This decision of the Circuit Court of Appeals, dated January 19, 1931, in which Martin T. Manton joined as

presiding member of the Court, was referred to in the arguments before the District Court and the Circuit Court of Appeals in the pending companion case against the City of New York and John A. Harriss, involving the same patent, which was tried and argued later, and the decision in the Syracuse Case had great weight and influence in the decision of said later argued case against the City of New York and John A. Harriss (Tr. p. 5, 6).

Following the conviction in 1939 of Martin T. Manton of having obstructed justice and defrauded the United States, said conviction having been affirmed by the Circuit Court of Appeals on December 4, 1939 and certiorari having been denied by this Honorable Court, Petitioners brought a motion before the Circuit Court of Appeals to recall the mandates and restore these cases to the calendar for reargument before the Circuit Court of Appeals.

The motion was based upon the disqualification of Martin T. Manton at the time of the hearing and decision of Petitioners' appeal in the first case of *Elmer W. Kelley et al.* v. *The City of Syracuse et al.* The criminal activities of Manton commenced in 1930, which was previous to the time when Petitioners' first appeal was decided by the Circuit Court of Appeals on January 19, 1931.

It appeared that when the appeal in said case was argued before the Circuit Court of Appeals, Martin T. Manton had knowledge of the pendency of the previously filed suit against the City of New York and John A. Harriss, former Special Deputy Commissioner for Traffic in the City of New York.

Since prior to the trial of both said cases, Manton had been under great obligation to Louis S. Levy, now disbarred by order of the District Court for the Southern District of New York, and who was then the personal attorney for John A. Harriss, co-defendant in the suit against the City of New York, said Levy having financially assisted Manton in a large way previously thereto. Therefore, Manton could not have decided the case against

the City of Syracuse fairly, impartially, and without prejudice, knowing that it would have a controlling influence on the pending suit against the City of New York and John A. Harriss, whose personal attorney was Manton's intimate friend and financial helper, Louis S. Levy (Tr. p. 4 to 6).

There has been no denial of the facts alleged.

The Circuit Court of Appeals denied Petitioners the relief sought because it took the view that Manton was not disqualified at the time when Petitioners' appeal was decided.

The question presented for determination here is as follows:

WAS IT SUFFICIENT TO DISQUALIFY MARTIN T. MANTON TO ACT AS A JUDGE OF THE CIRCUIT COURT OF APPEALS IN THE CASE OF ELMER W. KELLEY ET AL. v. THE CITY OF SYRACUSE ET AL. IN JANUARY 1931 THAT HE HAD PREVIOUSLY BEEN GUILTY OF CRIMINAL ACTS BY CONSPIRING TO OBSTRUCT JUSTICE THROUGH INFLUENCING DECISIONS OF SAID COURT, THAT AT THE TIME OF SAID DECISION HE WAS ENGAGED IN ENDEAVORING TO INFLUENCE DECISIONS OF SAID COURT IN OTHER CASES, THAT IN THE INSTANT CASE HE WAS UNDER SUBSTANTIAL OBLIGATION TO LOUIS S. LEVY, WHO WAS THE PERSONAL ATTORNEY FOR JOHN A. HARRISS, CO-DEFENDANT IN THE COMPANION SUIT WHICH WAS THEN PENDING AGAINST THE CITY OF NEW YORK, AND THAT MANTON HAD KNOWLEDGE OF THE PENDENCY OF THE SUIT AGAINST THE CITY OF NEW YORK AND KNEW THAT JOHN A. HARRISS WAS A CO-DEFENDANT IN SAID SUIT?

It is Petitioners' contention that Manton's criminal activities which commenced as early as 1930 and continued from then on, and the undenied facts which show probable

prejudice and bias against Petitioners, were sufficient to disqualify him in 1931.

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Circuit Court of Appeals, in denying Petitioners a rehearing, has erroneously decided that Manton was not disqualified in 1931 under the facts adduced in support of Petitioners' motion, and in so doing has so far departed from the accepted course of judicial proceedings and principles that guard the justice, fairness, impartiality, and disinterestedness of the judiciary as to call for an exercise of this Court's power of supervision.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in denying Petitioners' motion to recall the mandates and restore the cases to the calendar for reargument before the Circuit Court of Appeals.

SUMMARY OF ARGUMENT

I.

THE DENIAL BY THE CIRCUIT COURT OF APPEALS OF PETITIONERS' MOTION TO RECALL THE MANDATES AND RESTORE THE CASES TO THE CALENDAR FOR REARGUMENT IS AN ERRONEOUS DECISION OF WHAT CONSTITUTES DISQUALIFICATION OF A JUDGE, AND, THEREFORE, THESE CASES MERIT REVIEW.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT MANTON WAS NOT DISQUALIFIED, DESPITE HIS PREVIOUS CRIMINAL ACTS IN VARIOUS CASES AND THE CIRCUMSTANCES

WHICH POINT TO PROBABLE BIAS AND PREJUDICE, WAS AGAINST PUBLIC POLICY BECAUSE SUBVERSIVE OF THE INTEGRITY OF THE COURT, AND THEREFORE CONTRARY TO ESTABLISHED PRINCIPLES OF LAW.

ARGUMENT

I.

THE DENIAL BY THE CIRCUIT COURT OF APPEALS OF PETITIONERS' MOTION TO RECALL THE MANDATES AND RESTORE THE CASES TO THE CALENDAR FOR REARGUMENT IS AN ERRONEOUS DECISION OF WHAT CONSTITUTES DISQUALIFICATION OF A JUDGE, AND, THEREFORE, THESE CASES MERIT REVIEW.

The indictment under which Manton was tried and the decision of the Circuit Court of Appeals on his appeal show that he was conspiring to obstruct the administration of justice and to defraud the United States through the sale of judicial action as early as 1930 (Manton Rec. p. 9). The opinion of Mr. Justice Sutherland, December 4, 1939, affirming his conviction, stated that the several cases in which Manton accepted sums of money were pending "between the years 1930 and 1939."

Manton and William J. Fallon were friendly for many years back (Manton Rec. p. 628), and Manton was a large stockholder in the National Cellulose Corporation (Manton Rec. pp. 952, 953, 1004). Fallon at one time obtained a loan of $25,000.00 for said National Cellulose Corporation (Manton Rec. p. 638). James J. Sullivan was president of the National Cellulose Corporation since 1929 (Manton Rec. pp. 952, 953), and a loan of $250,000.00 from Lord & Thomas to the said James J. Sullivan was at one time negotiated by Levy for the benefit of Manton (Manton Rec. pp. 773 to 785). Of this, more than $228,000.00 was paid out on behalf of properties or companies owned or controlled by Manton.

Prior to January 1931, when said appeal of *Elmer W. Kelley et al.* v. *The City of Syracuse et al.* was argued before and decided by the Circuit Court of Appeals, Louis S. Levy was the personal attorney for John A. Harriss, who was a co-defendant in the suit then pending against the City of New York and John A. Harriss under the same patent. At the time of the argument and decision of the Syracuse Case, Manton knew that the New York Case on the same patent was pending and that John A. Harriss was a co-defendant in that case (Tr. p. 5).

Prior to January 1931, the said Levy had financially assisted Manton in a substantial manner, in helping to organize the National Cellulose Corporation in 1928, of which corporation Manton owned a large interest. Manton was under such obligation to Levy that he could not have fairly and impartially decided a case in which the said John A. Harriss, by reason of his great wealth and position as a pioneer in the installation of traffic signals in New York City, was greatly interested.

The obligation of Manton to Levy, who was personal attorney for John A. Harriss, co-defendant in the New York City Case, was an imperative reason for Manton deciding said appeal unfavorably to Petitioners, because Manton knew that the suit against the City of New York and John A. Harriss was then pending. The New York City Case was referred to during the trial of the Syracuse Case and in defendants' brief before the Circuit Court of Appeals in the Syracuse Case (Tr. p. 5).

Manton knew that the decision in the Syracuse Case was of tremendous importance to Petitioners because if the Syracuse system had been held to infringe, the New York City system could likewise reasonably have been held to infringe, whereas the adverse decision in the Syracuse Case made it increasingly difficult for Petitioners to sustain a charge of infringement in the New York Case.

A holding of infringement in the Syracuse Case would have carried much weight in the case against the City of

New York and John A. Harriss, and would in all probability have resulted in a holding of infringement as to the New York City system. The decision in the Syracuse Case was alluded to in the arguments of the New York Case, before both the District Court and the Court of Appeals.

Petitioners have no assurance that they received a fair and unbiased decision, and the known facts justify Petitioners in believing that they did not receive a fair and unbiased decision.

In the decision of the Circuit Court of Appeals on the Manton appeal, Mr. Justice Sutherland said:

> "For aught that now appears we may assume for present purposes that all of the cases in which Manton's action is alleged to have been corruptly secured were in fact rightly decided. But the unlawfulness of the conspiracy here in question is in no degree dependent upon the indefensibility of the decisions which were rendered in consummating it. Judicial action, whether just or unjust, right or wrong, is not for sale; and if the rule shall ever be accepted that the correctness of judicial action taken for a price removes the stain of corruption and exonerates the judge, the event will mark the first step toward the abandonment of that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago, that the judge must be 'perfectly and completely independent with nothing to influence or control him but God and his conscience.'"

If the unlawfulness of the conspiracy does not depend upon the incorrectness of the decision, it seems equally sound law that a judge is disqualified if guilty of criminal activities and the facts show probable bias and prejudice, even though there may be no proof of actual payment of money in the particular case.

Mr. Justice Sutherland on the Manton appeal said that the conspiracy was "to be consummated by sale of judicial action to all willing to pay the price."

Manton was willing to sell judicial action to any litigant ready to pay for a decision, and this alone would seem sufficient to disqualify him, but we have in the instant case additional facts which are sufficient to prejudice a criminally inclined judge, namely, that he was under great financial obligation to Louis S. Levy, since disbarred, the personal attorney for the co-defendant in the companion New York City Case.

As Mr. Justice Sutherland said, "Judicial action, whether just or unjust, right or wrong, is not for sale," and since Manton was ready to sell judicial action to any litigant, the disqualification surely existed as to a case in which the personal attorney for an affected party had rendered Manton great financial assistance and placed him under an obligation that Manton was not likely to ignore.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT MANTON WAS NOT DISQUALIFIED, DESPITE HIS PREVIOUS CRIMINAL ACTS IN VARIOUS CASES AND THE CIRCUMSTANCES WHICH POINT TO PROBABLE BIAS AND PREJUDICE, WAS AGAINST PUBLIC POLICY BECAUSE SUBVERSIVE OF THE INTEGRITY OF THE COURT, AND THEREFORE CONTRARY TO ESTABLISHED PRINCIPLES OF LAW.

Nothing is more important to the preservation of American democracy than to maintain the integrity of its courts, and especially is this true of the United States courts.

The importance of maintaining a fair and impartial judiciary, free from the slightest shadow or question, is recognized by the Judicial Code, Sec. 21 (36 Stat. at L. 1090, Chap. 231, U. S. C. Title 28, Sec. 25), which provides

for the disqualification of a district court judge, and this was invoked by this Court in *Berger v. United States*, 255 U. S. 22, 41 S. C. R. 230.

Considering that a district judge is disqualified upon an allegation of bias or prejudice, there should be no question as to the need for disqualifying a Circuit Court of Appeals judge, who in addition to accepting bribes in cases wherever obtainable, is so financially obligated to the personal attorney for a defendant in a companion case who might be seriously affected by the outcome. A judge who is prepared to sell judicial action to anyone ready to pay for it may be assumed to be prejudiced and biased in a case where he has accepted substantial financial aid from an attorney who is closely associated with and interested in one of the parties. Under the circumstances of Manton's previous criminal activities, and his existing financial relations with Levy, he could not reasonably have been expected to decide fairly and impartially a case which might injure Levy's personal client and friend Harriss.

In view of Manton's criminal acts since 1930, and his relations with Levy, there was a reasonable suspicion that he could not have decided this case fairly and without prejudice, if the fact that he was a criminal at the time was not alone sufficient to disqualify him.

The facts are sufficient at least to throw a shadow on the Court at the time when the decision was rendered, and in the interest of public policy, the reputation and integrity of the Court should be cleared by recalling the mandates and granting rehearings before a Court, no member of which could be open to question or suspicion.

Petitioners have a right to a hearing before a Court, all the members of which are free from possible suspicion, and this Petitioners did not receive.

It is in the public interest, as well as in pursuance of an inherent right to which Petitioners are entitled, that a

rehearing be accorded, for in no other way can suspicion be removed.

As stated in *Cotulla State Bank* v. *Herron*, 202 S. W. 797,

> "An independent, unbiased, disinterested, fearless judiciary is one of the bulwarks of American Liberty, and nothing should be suffered to exist that would cast a doubt or shadow upon its fairness and integrity."

In *State* v. *Seattle Board of Education*, 19 Wash. 8, 17, 52 P. 317, 67 Am. S. R. 706, 40 L.R.A. 317, it was held as follows:

> "The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of the courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and then proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens, and it should see to it that the scales in which the rights of the citizens are weighed should be nicely balanced."

This is the first instance in the history of American jurisprudence that a judge of a Circuit Court of Appeals has been found guilty of conspiracy to obstruct justice. If the integrity of our Courts of Appeals, one of the foundations of American democracy, is to be preserved and left unquestioned before the whole public, nothing should now be left undone to remove any existing doubt concerning a decision that was rendered by a Court which included Manton as a member.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the erroneous ruling made by the Circuit Court of Appeals for the Second Circuit may be corrected, that a grave injustice may not be done, and that the shadow and suspicion that has been cast upon the Circuit Court of Appeals for the Second Circuit be removed, and that to such an end a writ of certiorari should be granted and that this Court should review the judgment of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

IT IS RESPECTFULLY SUBMITTED THAT A WRIT OF CERTIORARI SHOULD BE GRANTED.

ELMER W. KELLEY
and
THE GENERAL STREET SIGNAL CORPORATION,

By Harold E. Stonebraker
Counsel for Petitioners.

Dated, May 21, 1940.
Rochester, N. Y.

IN THE

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No. 94

ELMER W. KELLEY AND THE GENERAL STREET SIGNAL CORPORATION,

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vs.

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ELMER W. KELLEY AND THE GENERAL STREET SIGNAL CORPORATION,

Petitioners,

vs.

THE CITY OF NEW YORK AND JOHN A. HARRISS.

BRIEF FOR RESPONDENTS.

HENRY R. ASHTON,
Counsel for Respondents in Syracuse Case.

GEORGE H. MITCHELL,
HARRY A. YERKES, JR.,
Counsel for Respondents in New York City Case.

June, 1940.

Fast Printing Company, Inc., 80 Lafayette St., New York, N. Y.

IN THE

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ELMER W. KELLEY AND THE GENERAL STREET SIGNAL CORPORATION,

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vs.

THE CITY OF NEW YORK AND JOHN A. HARRISS.

BRIEF FOR RESPONDENTS.

The Syracuse case was decided by the court below January 19, 1931 and the New York City case March 6, 1933[1]. No petition for writ of certiorari was filed in the Syracuse case. Certiorari was denied in the New York City case in October, 1933[2].

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[1] 47 F. (2d) 349; 63 F. (2d) 1007.

[2] 290 U. S. 637.

April, 1939, petitioners filed in the court below petitions for leave to file bills of review in both cases. Those petitions were heard May 15, 1939, and denied without opinion May 31, 1939. In June, 1939, a petition for rehearing of the said petitions was filed and was also denied without opinion on June 26, 1939. No petition for writ of certiorari was filed.

In February, 1940, petitioners again petitioned the court below, this time for a "reargument" of petitioners' former appeals[3]. That petition was based upon substantially the same allegations as the earlier petitions for leave to file bills of review. The petition for reargument was denied by the court below March 13, 1940.

The present petition for writ of certiorari asks this Court to review this latest order of the court below[4].

Each of the above mentioned petitions in the court below has been opposed by respondents on the ground that no fact is alleged which could justify granting of the relief sought. The present petition is also opposed on the same ground.

The petition asserts that the 1931 and 1933 decisions of the court below should be set aside because at the time the decision in the Syracuse case was rendered there was pending the case on the same patent against the City of New York and the late Dr. John A. Harriss, which case had not yet been tried; that Louis S. Levy was Harriss' personal lawyer; that Manton was under obligation to Levy; and that the pendency of the New York City case was known to Manton when the Syracuse case was decided in 1931. Manton did not sit in the New York City case. No evidence of any irregularity in either case has been shown.

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[3] R. 2.

[4] R. 15.

The petition fails to state that Levy was not of counsel for Harriss in the New York City case. That case was defended by the City of New York both on its own and Harriss' behalf and was handled by special counsel retained for that purpose[5].

As to the merits of these cases, the Court is respectfully referred to the respondents' brief in opposition to the petition for writ of certiorari in a third case by these same petitioners against the City of Atlantic City, *et al.*, October Term, 1939, No. 304, in which the petition was denied[6]. The Court's attention also is called to the fact that a petition for leave to file a bill of review containing substantially the same allegations as the present petition was filed in the Circuit Court of Appeals for the Third Circuit in the above mentioned Atlantic City case, and was denied by that court from the bench when the matter was orally presented June 15, 1939.

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

HENRY R. ASHTON,
Counsel for Respondents
in Syracuse Case.

GEORGE H. MITCHELL,
HARRY A. YERKES, JR.,
Counsel for Respondents
in New York City Case.

June, 1940.

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[5] 58 F. (2d) 831; 63 F. (2d) 1007.

[6] 302 U. S. 722.